Supreme Court, U.S.
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IN THE

Supreme Court of the United States

VISA U.S.A. INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a loyalty rule adopted by a joint venture prohibiting its members from competing directly with the venture violates § 1 of the Sherman Act, when the rule does not result in increased prices or reduced output in the consumer market in which the venture's members compete.

PARTIES TO THE PROCEEDING

Petitioner is Visa U.S.A. Inc., one of the defendants-appellants below. Respondent is the United States of America, plaintiff-appellee below. Visa International Service Association (sued as Visa International Corp.) and MasterCard International Incorporated, both defendants-appellees below, are respondents under this Court's Rule 12.6.

RULE 29.6 DISCLOSURE

Visa U.S.A. Inc. does not have a parent company. Visa U.S.A. Inc. is a member of, and has an ownership interest in, Visa International Service Association. Visa U.S.A. does not issue stock, and therefore no publicly held company owns 10 percent or more of Visa U.S.A.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Visa U.S.A. Inc. ("Visa") prays that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit is reported at 344 F.3d 229 and is reprinted in the Appendix ("App.") at 1a. The order of the Second Circuit denying rehearing and rehearing en banc is reprinted at App. 193a. The opinion of the district court is reported at 163 F. Supp. 2d 322, reprinted at App. 24a. An additional opinion by the district court is reported at 183 F. Supp. 2d 613, reprinted at App. 179a, and the Final Judgment, unreported, is reprinted at App. 189a.

JURISDICTION

The court of appeals' opinion was issued on September 17, 2003; an errata was filed October 17, 2003. A timely petition for rehearing and rehearing en banc was denied on January 9, 2004. App. 193a. The district court had jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.

STATEMENT OF THE CASE

This case squarely presents one of the most important questions in U.S. antitrust law: what are the limits of acceptable cooperation between direct rivals?

The restraint on competition at issue in this case is a rule adopted by business rivals who came together to establish a joint venture. The rule prohibits the venture's members from

competing directly with the venture itself in the market for the venture's product. Four incontrovertible record facts frame the antitrust law challenge to the joint venture loyalty rule at issue here:

- The joint venture is pro-competitive – i.e., it enables its members to provide a valuable consumer product that no individual member could provide on its own
- The consumer market for that product is extremely competitive – i.e., the joint venture's members compete vigorously with each other, and with the venture's rivals, giving consumers literally thousands of distinct product options, dramatically declining prices and significant innovation
- The challenged rule promotes the efficiency of the joint venture by ensuring its members' dedication to the venture
- The challenged rule does not increase prices or reduce overall output in the consumer market, and does not foreclose any competitor from that market

On those facts, the loyalty rule should have easily survived antitrust scrutiny – even though it is a self-avowed restraint on competition. The simple point is this: *every* joint venture rule restrains competition in some respect, but U.S. antitrust doctrine has recognized for more than a century that a pro-competitive joint venture can and must adopt restraints that enhance the venture's efficiency (and thus its effectiveness vis-à-vis its rivals), so long as the restraints do not reduce output or increase prices in the consumer market. When a restraint reduces output or increases prices, it is doing more harm than good, and thus can no longer be justified as a reasonable restraint on competition.

In a sharp break from century-old antitrust doctrine, the Second Circuit invalidated the joint venture rule at issue here on the facts set forth above. The court did so by adopting a standard that *presumes* that a horizontal agreement among

competitors causes competitive harm, even in the context of an indisputably efficient joint venture. In departing from the framework this Court's cases have established for analyzing joint venture restraints, the decision below creates a conflict with the decisions of two other circuits applying that framework, including most strikingly a Tenth Circuit decision that upholds a mirror-image loyalty rule of the same joint venture involved here. *See SCFC ILC, Inc. v. Visa U.S.A. Inc.*, 36 F.3d 958 (10th Cir. 1994); *see also Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986) (upholding similar loyalty rule of different joint venture).

Those conflicts should be resolved. They are prima facie evidence that the general rules this Court has prescribed for analyzing joint ventures have not given courts sufficient guidance to reach similar results in similar cases. Before the decision below, a company considering whether to enter a joint research, marketing, production, or distribution venture with its competitors could at least assure itself of security from antitrust challenge if it knew the venture's rules would not adversely affect prices or output in the highly competitive consumer market. Not so anymore. The only thing a company involved in a nationwide joint venture can be sure about now is that if and when it is sued, it will be sued in the Second Circuit and not in the Tenth or D.C. Circuit. Such regional variations undermine the sound administration of U.S. antitrust law. Certiorari should be granted.

A. Factual Background

1. Petitioner Visa U.S.A., Inc. ("Visa") is a joint venture established in the 1960s by financial institutions (mostly banks) to develop and promote an internationally recognized credit or "payment" card. It is operated on a not-for-profit basis.[1] The Visa joint venture was established after a few

[1] That is, no dividends are paid. Any revenue received by the joint venture in excess of costs is held in reserve to meet payment obligations in the case of default by an individual member.

individual banks tried but were unable to develop payment card networks by licensing their trademarks to other financial institutions. Visa does not actually issue payment cards to consumers; cards are issued by member banks. But Visa provides its members with two critical services that individual banks could not successfully perform on their own: (1) the promotion and marketing of a universally recognized mark; and (2) a system to facilitate the approval and processing of charges involving millions of merchants and cardholders and thousands of banks every day. Visa has approximately 14,000 members in the United States, about 6,000 of whom actually issue Visa cards. App. 34a. Members can also be "acquiring" banks – *i.e.*, the banks that verify and process card transactions for merchants. *Id.*

As both courts below and all parties agree, Visa embodies a classic pro-competitive joint venture: a group of competitors have joined together in a limited fashion to offer consumers an innovative product that none could offer on its own – bank-issued payment cards that can be used in virtually every consumer transaction in virtually every corner of the world. At the same time, the banks continue to compete with each other both in terms of issuing payment cards to consumers and, of course, in every other aspect of their business. In the district court's words, the members of the Visa venture "work together . . . to achieve benefits for themselves they could not provide independently, including globally recognized brands and sophisticated computer networks for processing transactions." App. 35a. That basic level of cooperation, in turn, facilitates vigorous competition: "The members of Visa and MasterCard compete with each other on practically every other dimension that directly impacts consumers, including pricing, fees and finance charges, product features and other services for cardholders and merchants." *Id.*; *see* Hovenkamp, *Antitrust Law* ¶ 2103d, at 34 (1999) (describing Visa as an "elaborate network-style joint

venture" in which there is "robust competition" among the individual members).

The result has been enormously expanded output, dramatically declining prices and extraordinary technological innovation – hallmarks of significantly increased competition. According to the district court's description of the consumer market in which Visa's members currently operate:

- "Before the existence of [Visa and MasterCard] there were no national credit cards, and charge cards were available only from three national issuers . . . . Today credit and debit cards that can be used nationally and internationally at millions of merchants are issued by thousands of association members." App. 37a.
- "The percentage of households with credit and charge cards quadrupled from 16 percent in 1970 to 68 percent in 1998." *Id.*
- "Minimum financial qualifications required for a credit card have declined dramatically so that even consumers with lower incomes are readily able to obtain payment cards." *Id.*
- "[P]rices to consumers have decreased 20 percent from 1984 to 1999." *Id.*
- "The [Visa and MasterCard] associations have . . . fostered rapid innovation in systems, product offerings and services." *Id.*
- "Cardholders today can choose from thousands of different card products with varying terms and features, including a wide variety of rewards and co-branding programs and services . . . ." App. 38a.

2. In addition to Visa and MasterCard, which both function as bank-owned joint ventures, there are two other major nationwide payment card networks: American Express ("Amex") and Discover. In contrast to Visa and MasterCard, Amex and Discover are wholly integrated for-profit enterprises, referred to by the district court as "closed loop" sys-

tems. App. 35a. Discover and Amex issue their own cards to consumers, promote their own brands and process merchant transactions themselves. *Id.* Discover and Amex have both experienced success (Amex is the largest issuer of payment cards in the United States as measured by transaction volume, and Discover is the third largest issuer when measured by number of cards outstanding, App. 36a),[2] but through different paths. Discover has sought to gain wide merchant acceptance by offering the lowest "merchant discount" (i.e., price) for its merchant servicing. *Id.* Amex, in contrast, imposes the highest merchant discount (App. 9a) and generally focuses on high-spending consumers and corporate cardholders. Amex's business strategy presumes that merchants (particularly high-end merchants) are willing to pay more money to process Amex transactions because accepting Amex attracts higher-spending customers to them.

Despite the success of these two business models, both Amex and Discover have sought ways to penetrate the Visa joint venture. In the 1980s, Discover's owner sought to become a Visa card issuer. More recently, Amex began to pursue the possibility of issuing Amex-branded cards through Visa's largest member banks. In a widely-noted 1996 speech to banks, Amex's chairman criticized the Visa and MasterCard joint ventures for having put price-*lowering*

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[2] The success of both the joint-venture and the integrated-enterprise approaches to payment-card-issuing demonstrate that both models have certain benefits. Although rivals in a joint venture can "pool" certain resources, they also must cede control over certain matters associated with joint production, including investment decisions. In the Visa joint venture, those decisions are the subject of consensus governance. A unitary enterprise such as Amex entails no such collective action obstacles. Indeed, Sears considered joining Visa, before deciding that the proprietary Discover card, under Sears' singular control, was a preferable option. *See SCFC ILC, Inc. v. Visa U.S.A. Inc.*, 36 F.3d 958, 961 (10th Cir. 1994). It is not surprising that both forms can be successful – Amex has obtained a 20% market share in dollar terms, versus 26% for MasterCard issuers collectively and 47% for Visa issuers collectively. App. 15a.

pressure on the merchant discounts Amex had been able to charge. C.A. E.R. E-1705-09. Amex contended that if higher-end banks shifted their high-end customers to Amex-branded cards with their higher merchant discount rates, the banks could "realize the advantages" of higher merchant discount rates across the board. *Id.* at E-1706.

3. Visa and MasterCard, however, have each adopted loyalty rules that prohibit member banks from issuing a competitor's cards. Under the first of those rules, Visa By-law 2.06, companies that own competing payment cards (*i.e.*, Amex and Discover) are prohibited from joining the Visa venture and issuing Visa cards. Conversely, under By-law 2.10(e), members of the Visa joint venture are prohibited from "issu[ing], directly or indirectly, Discover Cards or American Express Cards." Both rules enforce a common principle: an entity cannot be both a member and a competitor of the Visa joint venture at the same time.[3]

Antitrust law has long recognized the importance of ensuring loyalty among the members of a common enterprise. *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271,

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[3] There is an exception to this rule: Visa does allow its members to join MasterCard, and vice-versa. The history of this feature, known as "duality," is summarized at App. 58a-61a. Visa has always opposed duality and favored exclusivity, on the ground that exclusivity would ensure that its members are most completely dedicated to promoting the Visa brand. *See infra* note 4. Visa originally enforced a loyalty rule barring its members from joining MasterCard. Visa revised the rule in 1971 to allow certain smaller banks to join MasterCard, but one of Visa's larger members sued, arguing that it should not be forced to compete against banks that could be dual members. Visa then sought to restore a generally applicable prohibition against dual membership, but the Department of Justice warned in a business review letter that such a rule might hamper the development of other competing card systems and might diminish competition in certain regional markets. The Department emphasized that Visa should worry less about "inter-brand competition" and more about ensuring competition among individual issuers. In response, Visa relented and allowed its members to join MasterCard on equal terms.

281 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). By-law 2.10(e) is just such a rule. By ensuring Visa members' dedication to the Visa brand, it enhances the overall efficiency of the venture and reinforces the competitive strength of each individual member's card products. If members cannot issue cards under the Amex brand, they will necessarily channel their efforts toward building the Visa brand and supporting Visa programs, in order to be able to compete more effectively through Visa-branded cards against Amex, MasterCard issuers and each other. Uncontradicted record evidence showed, for example, that large Visa members would have been reluctant to allow Visa to invest in developing corporate card products to compete with Amex's dominant corporate card, if banks could have simply partnered with Amex to issue such a card. C.A. App. A-1476-79. Amex's admitted goal of selectively targeting the largest Visa banks with the most valuable consumers only magnifies concerns about conflicting incentives: Amex intended to cherry-pick those banks who could push the Amex brand on higher-end customers, undermining the comparative value of the Visa brand – to the detriment of other, smaller Visa members in whom Amex has no interest. App. 157a. Indeed, Amex admitted that by persuading banks to issue Amex cards, it hoped to drive a "wedge" between Visa and its members. C.A. E.R. E-440. Because By-law 2.10(e) prevents exactly the kind of conflicts Amex hoped to create, it enhances the competitive strength of the Visa joint venture.[4]

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[4] "Duality" between Visa and MasterCard, *supra* note 3, has undermined Visa's competitive strength to some degree, as the district court recognized, *see* App. 91a (noting evidence that "historically 'duality' has led to some blunting of competitive incentives"). This is exactly why Visa (a) has always disfavored duality, agreeing to the practice in the 1970s only under pressure from the Government, and (b) has recently sought to end duality as a practical matter by entering "dedication agreements" with most of its largest members, securing their more complete loyalty to the Visa venture and brand, App. 28a. Duality, however, has not historically weakened Visa's competitive strength to the degree that

B. Proceedings Below

1. The Government sued Visa and MasterCard alleging two theories of antitrust liability. Count One challenged the ventures' "dual governance," which allows major Visa members to sit on MasterCard's board, and vice-versa. The Government alleged that this structure diminishes competition by creating divided loyalties and conflicting incentives within each venture's board. The district court rejected this claim, finding that Visa and MasterCard have engaged in robust price-lowering competition with each other, and that each has worked to develop venture-specific innovative products designed to win consumers from the other. App. 91a-103a. Any concerns about conflicting incentives, the court held, arose not from dual *governance*, but from dual *issuance* – i.e., the fact that members of each venture may issue cards as a member of the other venture. App. 91a; *see supra* note 4. The Government did not appeal this ruling.

Count Two attacked Visa By-law 2.10(e) and MasterCard's analogous loyalty rule – the rules adopted to secure against further infiltration of the kind of conflicting incentives Visa had both feared and experienced as a consequence of duality. Although By-law 2.10(e) reduces those conflicts and thereby enhances the strength of the pro-competitive Visa joint venture, the Government nevertheless alleged that the rule constitutes an unlawful restraint on competition.

The district court agreed and ordered Visa to repeal By-law 2.10(e). The court reached that conclusion in the face of

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"triality" or "quadrality" would. That is because under duality, each Visa member is entitled to join MasterCard on essentially the same terms as any other Visa member, so there is little advantage to any one Visa member of joining MasterCard and reaping its benefits while affirmatively undermining the Visa brand. *See Antitrust Law* ¶ 2223b, at 333 n.17. By contrast, if Visa's largest members are enticed to issue Amex cards, those key members obviously would not have the same incentives to support and invest in innovative joint Visa products designed to enable all Visa members to better compete with Amex.

two of its own uncontroverted findings. First, the court observed that "[c]ompetition among issuers largely determines the prices that consumers pay and the variety of card features they can obtain." App. 36a. Second, the court found that "competition among issuers" is, in fact, so intense that prices had fallen dramatically and that consumers "today can choose from *thousands of different card products with varying terms and features*." App. 38a (emphasis added).

Despite those findings, the court concluded that By-law 2.10(e) reduces output in the overall payment-card market on the following basis: "Even though there are thousands of card issuers already in the United States, more are always better." App. 135a. Invalidating Visa's rule, the court believed, would enhance competition and consumer choice simply because it would allow Amex to use select Visa members as additional issuers through which to sell Amex card products to consumers. App. 126a-127a, 138a. In the district court's words, Amex may be a "successful issuer[]," but it "cannot alone duplicate the strength and breadth of issuance and acceptance achieved by defendants through issuance by thousands of different entities." App. 138a. Amex would benefit from access to Visa's members because they are a "unique distribution source" (App. 126a) offering "hard-to-duplicate card issuing skills and experience" (App. 138a). If Amex could access its customers through banks, the district court believed, it could expand the market for its specialty "Blue" card. App. 152a-154a. (The court acknowledged that the Blue card *already* "has been a success for American Express," but the court felt that its success for Amex has been "constrained" because Amex has not been able to enlist Visa members as Blue card issuers. App. 153a.) And, the district court believed, if Amex threatened to increase its already significant market share using Visa's members to issue new Amex-branded products, Visa's members might also be stimulated to add some more product

choices – on top of the "thousands" that already pervade the market. App. 151a-152a.

2. The Second Circuit affirmed. The court of appeals held By-law 2.10(e) to be anticompetitive principally because Amex had been unable to persuade any Visa member to issue an Amex card and thereby use Amex's network services. In other words, the court of appeals identified the primary harm to competition not as diminution in the wildly robust competition to issue cards *to the consuming public*, but as the exclusion of Amex from the opportunity to provide its services *to individual Visa banks*. App. 16a ("The most persuasive evidence of harm to competition is the total exclusion of American Express and Discover from a segment of the market for network services.").

Visa argued that this focus on banks rather than consumers was wrong because the very point of Visa's rule is to prohibit individual member banks from reaching side agreements with Amex to issue Amex cards. In so doing, the rule reinforces the competitive strength of the Visa joint venture and thereby enhances the ability of member banks to engage in price-lowering competition with Amex, with MasterCard issuers, and with each other, in the card-issuing market. Accordingly, Visa contended, the question should be not whether the rule restrains the competition among members to deal with Amex – it obviously does that – but whether that restraint in turn *harms consumers*, by allowing Visa to control output and prices in the card-issuing market by substantially foreclosing Amex from that market.

The Second Circuit rejected that approach, holding that Visa's rule had to be subjected to a higher standard because Visa is a horizontal joint venture, not a unitary enterprise:

> The restrictive provision is a horizontal restraint adopted by 20,000 competitors. . . . Each has agreed not to compete with the others in a manner which the consortium considers harmful to its combined inter-

> ests. Far from being "presumptively legal," such arrangements are exemplars of the type of anticompetitive behavior prohibited by the Sherman Act.

App. 20a. Viewing By-law 2.10(e) as an "exemplar" of illegality, the court affirmed the district court's invalidation of the rule, despite its failure to find any price increase or genuine output reduction in the consumer market. As the Second Circuit summarized the entirety of the "harm" to consumers caused by the rule: "[C]ertain types of products combining unique features of cards . . . would likely become available" absent the loyalty rule. App. 21a. The court of appeals failed to provide *any* explanation for why the difference of a few types of card products *in a market that already includes thousands of distinct products* represents the type of consumer harm that concerns antitrust law.

The Second Circuit's application of the wrong legal standard to Visa's joint venture loyalty rule led directly to its erroneous invalidation: by treating the rule as a presumptively unlawful horizontal restraint, the court was able to invalidate it without any genuine showing of increased prices or reduced output in the consumer market. But the court's analysis necessarily casts doubt on the legality of *any* competitive restraint that is ancillary to an otherwise lawful, procompetitive horizontal joint venture. This Court should grant review and reverse the judgment below.

REASONS FOR GRANTING THE WRIT

> *No analytical exercise is more important to U.S. competition policy than defining the bounds of acceptable cooperation between direct rivals.*
>
> – Federal Trade Commission Chairman Timothy Muris, *In re Polygram Holding, Inc.*, No. 9298, 2003 FTC LEXIS 120, at *12 (F.T.C. July 24, 2003).

Despite Chairman Muris's admonition, the rules governing cooperation between direct rivals do not, at present, provide adequate guidance to businesses and courts seeking to

define the limits of acceptable cooperation. Although joint ventures and other forms of cooperation among firms make up a large and critical part of the U.S. economy, this Court has not addressed joint ventures in the antitrust context since *NCAA v. Board of Regents*, 468 U.S. 85 (1984). Not only has antitrust law developed considerably since *NCAA*, but that decision has not resulted in the consistent treatment of joint venture ancillary restraints by lower courts, as this case so strikingly illustrates.

There will be no better, or more important, opportunity for the Court to clarify how joint venture ancillary restraints should be analyzed. This case is an ideal vehicle for addressing uncertainty among courts and companies about how to treat joint ventures, because this case exemplifies that uncertainty: the Second Circuit's decision invalidates one Visa joint venture loyalty rule, in conflict with a Tenth Circuit decision upholding a mirror-image Visa joint venture loyalty rule, *see SCFC ILC, Inc. v. Visa U.S.A. Inc.*, 36 F.3d 958 (10th Cir. 1994) ("*MountainWest*"), and with a D.C. Circuit decision upholding a similar joint venture loyalty rule, *see Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986). What is more, this case involves the fundamental structure of businesses which, in increasing measure, provide the currency by which a large portion of worldwide consumer transactions are conducted. Few petitions on this Court's certiorari docket will present such an important question of law in a case with such broad practical consequences. Certiorari should be granted.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF TWO OTHER CIRCUITS AND IS IN TENSION WITH THIS COURT'S DECISIONS

The decision below conflicts with Tenth and D.C. Circuit decisions interpreting and applying the framework this Court has established for analyzing antitrust challenges to restraints on competition imposed in the context of horizontal joint ventures. To understand the nature and significance of that

conflict, however, it is necessary first to understand the analytical structure this Court's own cases have erected, as well as the manner in which the decision below departs from that structure. We therefore begin by discussing this Court's precedents, then turn to the decision below and the other circuit decisions with which it conflicts.

A. This Court's Precedents Require Plaintiffs Challenging Joint Venture Ancillary Restraints To Prove Harm To Competition In The Consumer Market

A joint venture is, by definition, a horizontal agreement among competitors to restrain trade. *See* Langenfeld & Morris, *Analyzing Agreements Among Competitors: What Does The Future Hold*, 36 Antitrust Bull. 651, 655 (1991) ("Most organizations and joint ventures are, in essence, collections of agreements not to compete in a variety of dimensions."). Although § 1 of the Sherman Act prohibits all agreements in restraint of trade, this Court has recognized from the Act's earliest days that because the Act's literal terms prohibit "every conceivable contract or combination . . . anywhere in the whole field of human activity," *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911), it is only *unreasonable* restraints that the Act condemns, *see Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918). Some horizontal restraints are considered presumptively unreasonable, *see, e.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940), but joint venture agreements are not within that category. In fact, just the opposite is true: because joint ventures enable member firms to provide products or services at lower prices, or to provide products or services that otherwise would not exist at all, they are regarded as "presumptively lawful" under the antitrust laws. *Antitrust Law* ¶ 2100g, at 14; *see id.* ¶ 2104a, at 36 ("Joint ventures are presumptively good things because they reduce firms' costs of obtaining certain inputs and enable firms to do things that they could not otherwise do, or to do them bet-

ter."). Accordingly, the law recognizes that a joint venture should be adjudged unlawful only if the efficiency gains to the venture's members are outweighed by their ability to reduce market output and raise prices. *Id.* ¶ 2100g, at 14-15.

The essence of these principles was first described by Judge (later Chief Justice and President) Taft in his landmark opinion in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898).[5] *Addyston Pipe* distinguishes between two types of horizontal restraints on competition: "ancillary" and "naked." A restraint is "ancillary," Judge Taft explained, when it is merely an "incident" to a union between competitors that is intended to facilitate "a successful business, and one useful to the community," even if the effect of that union is also to reduce the competition between them. 85 F. at 280; *see id.* at 282 ("ancillary" restraint is one "necessary to protect the covenantee in the full enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party"). Judge Taft described as a classic "ancillary" restraint an agreement between business partners "not to do anything to interfere, by competition or otherwise, with the business of the firm." *Id.* at 281. By contrast, a restraint is "naked" when its purpose is *only* to restrain competition, and not to enable the efficient operation of the joint enterprise. *Id.* at 282-83. As the Seventh Circuit has explained, "naked" restraints are "those in which the restriction on competition is unaccompanied by new production or products," whereas "ancillary" restraints are "those that are part of a larger endeavor whose success they promote." *Polk Bros., Inc. v.*

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[5] *See Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 738-39 (1988) (Stevens. J., dissenting) ("Although Judge Taft was writing as a Circuit Judge, his opinion is universally accepted as authoritative. We affirmed his decision without dissent, we have repeatedly cited it with approval, and it is praised by a respected scholar as 'one of the greatest, if not the greatest, antitrust opinions in the history of the law.'" (quoting Bork, *The Antitrust Paradox* 26 (1978)).

Forest City Enters., 776 F.2d 185, 188-89 (7th Cir. 1985); *see Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (restraint is "ancillary" when it "serves to make the main transaction more effective in accomplishing its purpose").

This Court elaborated and applied these principles in two important cases evaluating the antitrust implications of joint ventures: *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979) ("*BMI*"), and *NCAA v. Board of Regents*, 468 U.S. 85 (1984). In *BMI*, a television network challenged a so-called "blanket license" agreement under which music composers and performers jointly formed an association (known as ASCAP) which they agreed would charge and collect, on behalf of the members, a fixed fee for the performance of copyrighted music. The Second Circuit held that the blanket license constituted illegal *per se* price-fixing, but this Court disagreed: "The blanket license, as we see it, is not a naked restraint of trade with no purpose except stifling of competition . . . but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use." 441 U.S. at 20 (citations, alterations, and internal quotation marks omitted). Although the blanket license explicitly restrained competition among individual licensors, the costs of negotiating and monitoring individual licenses would be prohibitively expensive for many composers and other copyright owners. *Id.* at 20-21. The blanket license thus resulted in a "substantial lowering of costs" for both licensors and licensees, creating what was in effect a "different product" from an individual license, one that allowed individual composers to compete effectively in a market where they otherwise could not. *Id.* at 21-23. "ASCAP does set the price for its blanket license, but that license is quite different from anything any individual owner could issue." *Id.* at 23. Because the blanket license agreement, although a restraint on competition, actually operated

to lower costs and increase the output of music, the Court regarded it as presumptively pro-competitive. *Id.* at 24.

The Court reaffirmed these principles in *NCAA*, which involved an antitrust challenge to a rule of the NCAA joint venture limiting the rights of members to televise home football games. The Court began with the premise first enunciated in *Addyston Pipe*: the basic NCAA joint venture, although it unquestionably restricted competition between universities in many significant ways, was nevertheless a presumptively valid, pro-competitive venture because the horizontal restraints it imposed on members "enable[d] a product to be marketed [i.e., collegiate athletic contests] which might otherwise be unavailable." *NCAA*, 468 U.S. at 102. By restricting competition through a fixed set of rules governing all members, the joint venture's "actions widen[ed] consumer choice ... and hence can be viewed as procompetitive." *Id.* As *BMI* had already "squarely" held, "a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive." *Id.* at 103. But the specific rule in *NCAA* could not meet that standard: it clearly increased the price and restricted the output of football games, without "produc[ing] any procompetitive efficiencies which enhanced the competitiveness of college football television rights." *Id.* at 114. The Court recognized that if the NCAA joint venture had "faced 'interbrand' competition from available substitutes, then certain forms of collective action might have been appropriate in order to enhance its ability to compete," *id.* at 115 n.55, but it held that because there was no significant market substitute for televised college football, the television restrictions could not be justified as pro-competitive on that basis, *id.*

In sum, *Addyston Pipe*, *BMI*, and *NCAA* all recognize that business competitors who come together in a joint venture may (indeed must) impose certain restraints on competition among themselves. Any such restraint will be upheld so long as (a) it makes the venture more effective in accom-

plishing its purpose (i.e., it is "ancillary"), and (b) it does not increase prices or reduce overall output in the consumer market in which the venturers operate. As we now show, the decision below cannot be reconciled with those principles.

B. The Decision Below Departs From This Court's Precedents By Applying An Improper Standard To By-law 2.10(e) And Thereby Invalidating The Rule Without Concrete Proof Of Consumer Harm

1. The Second Circuit's decision in this case invalidates By-law 2.10(e) by first reversing the normal presumption favoring restraints that facilitate the efficient operation of joint ventures, and then, because of that error, by failing to hold the Government to its burden of proving that By-law 2.10(e) harms competition in the consumer payment card market by raising prices or reducing output in that market.

The decision begins by emphasizing that the rule precludes Amex from providing "network services" to Visa's members. App. 16a. But that restraint on competition is not the *problem* with Visa's loyalty rule, it is the *very point* of the rule – to preclude members from negotiating "side deals" with Amex to issue cards under the Amex brand. In this respect, the rule works just like the rule of a law firm partnership prohibiting individual partners from moonlighting at rival firms. There is nothing inherently, or even presumptively, unlawful about such a rule. *See NFL v. NASL*, 459 U.S. 1074, 1078 (1982) (Rehnquist, J., dissenting from denial of certiorari) (Sherman Act does not require "a law firm to countenance its partners working part time at a competing firm while remaining partners"). Just the opposite is true: as *Addyston Pipe* long ago recognized, rules barring partners in an enterprise from competing with the enterprise are a classic form of pro-competitive, "ancillary" restraint. 85 F. at 281-82.[6] As both *Addyston Pipe* and subsequent cases have held,

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[6] It bears emphasis that even under By-law 2.10(e), any member bank that chooses to issue an Amex card may do so, just as any law firm

such a restraint therefore is presumptively *lawful* – the only relevant question is whether the restraint reduces output or increases prices in the consumer market.

The Second Circuit's decision rejects that approach, holding that Visa's rule must be treated as presumptively *unlawful*, merely because it is part of a horizontal agreement between competitors. Specifically, in emphasizing the horizontal nature of the agreement, the decision adopts a standard that *presumes* a threat of competitive harm, and disregards the undisputed *actual facts* concerning competition in the card-issuing market. *Cf. California Dental Ass'n v. FTC*, 526 U.S. 756 (1999) (certiorari granted to review court of appeals' use of truncated rule of reason analysis).

On its face By-law 2.10(e) is a restraint on the distribution of payment cards – specifically, an agreement among Visa members not to distribute Amex cards. In the exclusive distributorship context, of course, harm to competition can be found only where the plaintiff demonstrates that the exclusive distribution arrangement so substantially forecloses rivals from access to the ultimate consumer market that the defendant is able to control output and prices in that market. *See Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 394 (7th Cir. 1984) (Posner, J.); *Antitrust Law* ¶ 1802b, at 62-63. In this case, the undisputed facts are that By-law 2.10(e) has *not* foreclosed Amex *at all* from the card-issuing market (Amex is in fact the single *largest* issuer), and that Visa's members exercise *no* control over price or output in the extremely competitive card-issuing market, which includes thousands of distinct card products and issuers. Those facts should have easily defeated any claim that By-

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partner may choose to work for another firm. By-law 2.10(e) simply means that a bank cannot issue an Amex card and still remain a Visa member. Accordingly, even today, if Amex offered a Visa bank sufficiently attractive economic terms, the bank could leave Visa and begin issuing Amex cards. The decision below simply enables Amex to reach the same deal, but on terms more favorable to Amex.

law 2.10(e) harms competition. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring). But the Second Circuit refused to find those essential facts dispositive, solely because Visa's rule is a "horizontal restraint adopted by 20,000 competitors." App. 20a. "Far from being 'presumptively legal,'" the court insisted, "such arrangements are exemplars of the type of anti-competitive behavior prohibited by the Sherman Act." *Id.*

That critical statement flatly contradicts the cases, dating back to *Addyston Pipe*, establishing that restraints ancillary to pro-competitive joint ventures *are* "presumptively legal," and must be upheld absent proof that they reduce output or increase prices. *See supra* at 14-16. There was no such showing here – but that did not matter to the court of appeals, because under the legal standard it applied, By-law 2.10(e) is an "exemplar[]" of unlawful conduct. By invoking that standard, the Second Circuit ruled out serious examination of the harms to competition allegedly caused by By-law 2.10(e). The court thus casually affirmed the district court's startling conclusion that Visa's loyalty rule has harmed competition because it precludes the single most successful competitor in the payment-card market – Amex – from adding its own *bank-issued* card products to the thousands of choices consumers already have. App. 17a-18a, 21a. In the Second Circuit's simplistic formulation: absent By-law 2.10(e), "certain types of products combining unique features of cards . . . would likely become available." App. 21a.

The conclusion that this type of "harm" suffices to render an ancillary restraint unlawful is as contrary to basic antitrust analysis as is the standard of presumptive illegality enunciated by the Second Circuit. Properly understood, the question is not whether there might be one or two or ten more products *in a market already flooded with thousands of products*. It is whether the joint venturers, through the restraint, are able to control overall output and thereby increase prices in that market. *See Antitrust Law* ¶ 1912b, at 286

("the fundamental nature of the rule of reason inquiry . . . is to determine whether a restraint destroys competition by reducing the size, or output, of a market"); *id.* ¶ 1912e, at 292 (output reduction is "a prerequisite to a supracompetitive price increase").[7] Nobody contends – and certainly no record evidence established – that By-law 2.10(e) has enabled Visa's member banks to exert any such control over output and prices in the extremely competitive card-issuing market.[8]

Especially given the standard presumption favoring efficiency-enhancing ancillary restraints, the uncontroverted record of competitive output, pricing and innovation in the payment-card market should have compelled judgment for Visa. But because the court of appeals failed to appreciate the unique legal and economic significance of joint ventures, it reversed the usual presumption, holding Visa's rule to be presumptively unlawful merely because it is, *like most joint venture rules*, an agreement among direct rivals. The framework adopted by the Second Circuit conflicts with the

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[7] If antitrust law is not concerned with "how many *sellers* of a particular good or service there are," so long as "there are enough to assure [consumers] a competitive price and quality," *Products Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Co.*, 682 F.2d 660, 664 (7th Cir. 1982) (emphasis added), it follows *a fortiori* that antitrust law also is not concerned with how many *products* there are, so long as there are enough to assure consumers a competitive price and quality. Here, there are thousands of distinct payment card products available in the market, more than enough to assure competitive price and quality, as the evidence of market conditions unambiguously established.

[8] Neither By-law 2.10(e), nor any other Visa rule, limits the number of cards a member may issue or controls the features a member's card may provide. Visa members already issue as many cards with as many different features as the market will bear. Not surprisingly, the Government introduced no concrete evidence establishing that By-law 2.10(e) had prevented the introduction of any cards with features not already available in the incredibly diverse card-issuing market.

analysis of joint venture restraints that has governed for more than a century.[9]

2. The Second Circuit's decision also runs counter to two decades of this Court's precedents – reaffirmed most recently in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872 (2004) – recognizing that courts should not lightly countermand business decisions made in competitive marketplaces. In *Trinko*, this Court observed that a "realistic assessment of [the] costs" of "antitrust intervention" requires courts to beware the risk of "false positives" that may result from efforts to distinguish hard competition – which the antitrust laws strongly favor – from illicit exclusionary conduct. *Id.* at 840. "Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)); *see also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993); *Cargill, Inc. v. Monfort, Inc.*, 479 U.S. 104, 117 (1986). As then-Judge Breyer explained in his seminal opinion anticipating the pricing-

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[9] The courts below applied another incorrect antitrust standard in requiring Visa to establish that By-law 2.10(e) is necessary for the Visa joint venture to survive. App. 166a (defendants did not prove that their loyalty rules are "necessary to protect the fragile associations"). "The antitrust laws impose a standard of reasonableness, not a standard of absolute necessity." *NFL*, 459 U.S. at 1079 (Rehnquist, J., dissenting from denial of certiorari). If a rule enhances the efficiency of a joint venture without increasing consumer prices or reducing market output, it necessarily promotes consumer welfare and thus should not be condemned, even if the venture might be able to survive without the rule, or with some less "restrictive" rule. *See* Roberts, *The Evolving Confusion Of Professional Sports Antitrust, The Rule Of Reason And The Doctrine Of Ancillary Restraints*, 61 S. Cal. L. Rev. 943, 1009 (1988) ("it is wholly illogical to condemn intraventure agreements that . . . enhance the venture's efficiency simply because a court believes the particular agreement . . . is not absolutely essential to the survival of the business or might be less onerous in its limitations"); *accord Antitrust Law* ¶ 1913c, at 306-08.

conduct decisions that *Trinko* built upon: "[L]aw is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients," and we "must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983).

So it is here. The decision below sets off on "a search for a particular type of undesirable . . . behavior" in a highly competitive marketplace, but finds it only by lowering the bar to finding such undesirable behavior. In so doing, the decision necessarily will "end up . . . discouraging legitimate . . . competition" by chilling others from adopting pro-competitive joint venture loyalty rules. *See infra* Part II.

C. The Decision Below Conflicts With Other Circuit Decisions Upholding Joint Venture Loyalty Rules

The Second Circuit's departure from the basic principles applicable to joint venture restraints places its decision in conflict with Tenth and D.C. Circuit decisions upholding similar joint venture loyalty rules against antitrust challenge.

1. The conflict with the Tenth Circuit's *MountainWest* decision is the most obvious: that case upheld a complementary Visa loyalty rule that is essentially indistinguishable in its purpose and effect from the rule invalidated here. This case involves By-law 2.10(e), which prohibits members from issuing cards under the competing Amex or Discover brands. *MountainWest* involved By-law 2.06, which prohibits Amex and Discover themselves from becoming members of the joint venture and issuing Visa cards. In slightly different ways, both rules enforce the exact same loyalty principle: an entity cannot be a member of the Visa venture while issuing payment cards in competition with the venture.

By-law 2.06 was initially found by a jury in *MountainWest* to be a violation of Sherman Act § 1. The Tenth Circuit reversed, holding that, *as a matter of law*, By-law 2.06 could not be invalidated under accepted antitrust principles governing joint ventures. Perhaps recognizing that *MountainWest* cannot be meaningfully distinguished from this case, the Second Circuit did not even acknowledge the decision in its opinion below. In fact, the Tenth Circuit's analysis conflicts with the Second Circuit's from start to finish.

First, the Tenth Circuit held that because the payment-card-issuing market is intensely competitive, Visa lacked the market power necessary to control output and increase prices in that market, even by excluding a competitor from the venture. 36 F.3d at 967-68. The Tenth Circuit thus found dispositive the critical fact ignored by the Second Circuit.

Second, the Tenth Circuit specifically rejected the claim – accepted by the Second Circuit here – that Visa's rule should be deemed suspect simply because it reflects a horizontal agreement. Citing the precedents of this Court discussed above, the Tenth Circuit explained: "The very existence of a joint venture in the first instance is premised on a pooling of resources to affect competition in some manner and is made functional through some form of cooperative behavior or rule-making. However, the Court has made clear [that] . . . cooperative conduct alone is not prohibited." *Id.* at 968. Accordingly, the antitrust question remains the same, despite the existence of a horizontal restraint: Does the restraint "increase price, decrease output, or otherwise capitalize on barriers to entry that potential rivals cannot overcome"? *Id.* The Tenth Circuit employed traditional antitrust standards to evaluate By-law 2.06, in other words, whereas the Second Circuit analyzed By-law 2.10(e) through a very different lens, one clouded with suspicion and doubt.[10]

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[10] Also in contrast to the decision below, the Tenth Circuit explicitly acknowledged the basic pro-competitive effect of a rule excluding com-

Third, the Tenth Circuit then addressed and rejected Discover's claim that "consumers would be harmed by being denied the opportunity to select a Prime Option card from the possible choices in the general charge card market." *Id.* at 969. This is even stronger than the claim accepted by both courts in this case, *viz.*, that consumers are harmed because Amex has not reached as many consumers as it would like with its own special Amex card products. The Tenth Circuit rejected this entire theory of antitrust liability out of hand:

> Nor did [By-law 2.06] bar Sears from access to [the issuing] market. There was no evidence Sears could only introduce a Prime Option card with Visa USA's help or that Visa USA's exclusion from its joint venture disabled Sears from developing its new card under the Discover mantle. More importantly, there was no evidence the bylaw harms consumers, the focus of the alleged violation. Indeed, the evidence established that the current market in general purpose credit cards is structurally competitive, issuers targeting different consumer groups and consumer needs. In this market, Sears already competes vigorously. Surely, if its goal is to compete more effectively in that market, we do not believe this objective constitutes the proverbial sparrow the Sherman Act protects.

Id. at 971-72. The same is true here. There was no evidence that Amex has been barred from the issuing market – indeed, it was undisputed that Amex *can* reach *every* card consumer when it wants to. Tr. T-2006-07, T2112-13. The courts below simply thought that Amex might be able to reach consumers *even more easily* if it could tap into the distribution

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petitors from a joint venture. *See* 36 F.3d at 972 n.20 ("'Selectivity in the membership of the joint venture often enhances the joint venture's procompetitive potential.'" (quoting U.S. Dept of Justice, International Operations Antitrust Enforcement Policy 42 (Nov. 19, 1988)).

capacities of Visa's members. That is not "harm" of the kind that concerns the antitrust laws, as *MountainWest* squarely holds. The Second Circuit failed to analyze that harm properly, because of the reverse presumption it invoked disfavoring horizontal joint venture rules. The analysis and result in this case cannot be reconciled with *MountainWest*.

2. The decision below also conflicts with the D.C. Circuit's decision in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), on which the *MountainWest* court heavily relied. *Rothery* involved a policy instituted by an interstate van line joint venture, under which no member carrier could compete with the van line for interstate carriage. The D.C. Circuit – in an opinion by Judge Bork, joined by then-Judge R.B. Ginsburg – rejected an antitrust challenge to the rule, holding that it was a lawful ancillary restraint because it was "designed to make the van line more efficient rather than to decrease the output of its services and raise rates." *Id.* at 211. In direct conflict with the reverse presumption invoked by the Second Circuit, the *Rothery* court explained that universal condemnation of horizontal restraints simply because they are horizontal would be economically inefficient and contrary to this Court's precedents. *Id.* at 229. Rather, an ancillary horizontal restraint "is to be judged according to its purpose and effect." *Id.* Consistent with this Court's precedents, the court held that so long as the restraint does not "decrease the output of its services and raise rates," it should be deemed reasonable and therefore lawful. *Id.* at 211.

The D.C. Circuit's rejection of the antitrust claim in *Rothery* is at odds with the Second Circuit's affirmance of the judgment against Visa here. Whereas the decision below rests on its stated premise that a horizontal joint venture restraint is an "exemplar" of illegality, *Rothery* recognizes that when the horizontal agreement is part of an efficient joint venture, the agreement must be deemed presumptively *lawful*, for any enterprise (whether unitary or joint) must estab-

lish rules in order to succeed. *Rothery* requires joint venture restraints to be analyzed according to whether they increase prices or reduce output; the decision below does not. That conflict should be resolved.

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Although we submit that the principles laid down in cases such as *Addyston Pipe*, *NCAA*, *MountainWest*, and *Rothery* should have provided adequate guidance to resolve this case in Visa's favor, the conflict between those decisions and the decision below provides object proof that the standards this Court has thus far enunciated have *not* provided sufficient clarity to courts addressing antitrust challenges to joint venture rules. Even if one does not believe, as some commentators do, that this Court's precedents have "failed to offer a unified method of analysis," it is certainly fair to say that analysis of joint venture rules in the lower courts is too often "largely piecemeal and contradictory." Piraino, *Reconciling Competition and Cooperation: A New Antitrust Standard For Joint Ventures*, 35 Wm. & Mary L. Rev. 871, 878 (1994); *see* Chang, *Some Economic Principles For Guiding Antitrust Policy Toward Joint Ventures*, 1998 Colum. Bus. L. Rev. 223, 225 ("The antitrust treatment of joint ventures is often tortured."). Such confusion can only be exacerbated by the decision below. At a bare minimum, it is clear that antitrust plaintiffs seeking to challenge rules employed by nationwide joint ventures will now be *much* more likely to bring their actions in the Second rather than Tenth or D.C. Circuits. Preventing such circuit-shopping is a central consideration governing the exercise of this Court's certiorari jurisdiction. The conflict and uncertainty created by this decision should be resolved.

II. THE ISSUES PRESENTED BY THIS CASE ARE EXTREMELY IMPORTANT FOR U.S. BUSINESSES AND CONSUMERS

As F.T.C. Chairman Muris has emphasized, clarity in the rules governing "cooperation between direct rivals" is a matter of overriding significance to U.S. antitrust policy. *See supra* at 13. This is so because of the vital role cooperative agreements – joint ventures, that is – play in the efficient functioning of a competitive market economy.

1. Joint ventures promote competition because they enable companies to combine resources to achieve competitive objectives that would otherwise never be realized, including research and development of new products and expanded availability of products and services. "It takes so much money to develop new products and to penetrate new markets that few companies can go it alone in every situation." Hamel, *Collaborate With Your Competitors – And Win*, Harv. Bus. Rev., Feb. 1989, at 133. Agreements among rival firms thus may serve to "generate large efficiencies through the integration of facilities in research and development, production, marketing, information gathering and quality assurance," which "may effectively lower the costs of using markets to allocate goods and services." Langenfeld & Morris, *supra*, at 654. Empirical research has even quantified the economic benefits of competitor cooperation. *See* Gleason et al., *Evidence of Value Creation In The Financial Services Industries Through The Use Of Joint Ventures And Strategic Alliances*, The Financial Review, May 2003, at 213.

2. The decision below threatens the formation of economically valuable joint ventures in at least two ways.

First, the decision casts serious doubt on the legality of many rules that promote the efficiency and effectiveness of welfare-enhancing joint ventures. *See* Langenfeld, *supra*, at 655 ("Most joint ventures and association rules are, on balance, procompetitive, so it is critical that law enforcement

actions not destroy the basic proconsumer efficiency aspects of the association or joint ventures."). As discussed above, Visa's loyalty rule is designed to ensure that members support investments in Visa-branded products and focus their marketing on those products. As the D.C. Circuit recognized in *Rothery*, joint ventures can succeed only if they adopt rules ensuring that members do not undermine the venture. *See supra* at 26-27. The Second Circuit, however, has declared such competition-restricting rules presumptively unlawful. As a result, establishing a joint venture with loyalty rules will now carry a serious litigation risk, and because such rules are critical to the formation and efficient functioning of many ventures, fewer ventures will be formed.

Notably, the Second Circuit's rule is not limited only to loyalty rules – the decision on its face treats *any* horizontal agreement in a joint venture as an "exemplar[]" of illegality. App. 20a. Accordingly, any lawyer would have to advise a client considering a venture with rivals that the Second Circuit's decision places a heavy burden on the venture to justify (often to a lay jury, under threat of treble damage liability) *every* rule that restricts competition among members. The decision thus creates a palpable legal risk for all horizontal joint ventures.

Second, even apart from the merits of the decision below, certiorari is warranted because of the uncertainty it fosters and the impact of that uncertainty on joint venture formation. There is already a "real perception" – both wrong and unnecessary – "that the antitrust laws discourage all collaborative activity, irrespective of the procompetitive benefits achieved." H.R. Rep. No. 103-94, at 177 (1993). To the extent businesses are already unclear about which collaborative efforts will be deemed lawful, their uncertainty can only be deepened by the decision below. Such confusion inevitably impedes the formation of joint ventures, depriving U.S. markets of many of their competitive benefits. *See* Piraino, *supra*, at 878 ("confusion" regarding antitrust rules has "de-

terred the formation of new joint ventures," which "could have serious consequences for the American economy").

3. Finally, this case, on its own facts, will have extremely broad practical consequences for U.S. companies and consumers. As any consumer knows, payment-card transactions are fast becoming a key mode of commercial exchange in our increasingly "paperless" economy. The entire point of the Government's action is to remake the structure – developed in the competitive marketplace – through which those payment-card transactions are processed. At present, Visa- and MasterCard-issuers not only compete with each other, but they compete with Amex, which has flourished in the market, despite its higher prices, because of its successful targeting of higher-end businesses and consumers. The basic theory of the Government's action is that Amex should *also* be allowed to use Visa's own largest members to reach high-end businesses and consumers with Amex's higher-priced products. Accordingly, the necessary effect of invalidating Visa's loyalty rule will *not* be lower prices for consumers – it is undisputed that the rule does not have any price-raising effect – it will be to expand the *higher*-price Amex-branded business.[11] Only review by this Court can forestall that perverse outcome.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[11] Elimination of By-law 2.10(e) will *not* expand the output of *Discover's* lower-priced business: Discover executives testified that because of Discover's lower merchant discount rate, it will not be able to offer the financial incentives necessary to entice Visa members to issue Discover cards. C.A. E.R. E-635; Tr. T-2569-70.

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